CANADIAN RAILWAY OFFICE OF ARBITRATION

CASE NO. 2383

Heard at Montreal, Wednesday, 14 July 1993

concerning

VIA RAIL CANADA INC.

and

CANADIAN BROTHERHOOD OF RAILWAY, TRANSPORT AND GENERAL WORKERS

EX PARTE

DISPUTE:

The Corporation is progressively eliminating its subsidy of the retirees' Extended Health Care Plan.

BROTHERHOOD'S STATEMENT OF ISSUE

On or about December 4, 1991, the Corporation forwarded a memo to all VIA Rail Canada Inc. retirees and surviving spouses to advise them that it was the intention of the Corporation to phase out the Extended Health Care subsidy over a five year period. At no time did VIA Rail notify the Brotherhood of the change in the aforementioned past practice.

This matter was brought to the attention of the Brotherhood by the pensioners and was then grieved as a policy grievance on behalf of all retirees, spouses of retirees and employees about to retire. The union claims that the phasing out of the subsidy is contrary to past practice, estoppel, Article 33 of Agreement No. 2 and Article 36 of Agreement No. 1, and previous arrangements establishing this benefit for the retirees, surviving spouses and future retirees.

The Corporation claims that the matter is not arbitrable whereby the Brotherhood is not the bargaining agent for retirees.

The Brotherhood requests that the subsidy of the Extended Health Care Plan be continued for all retirees and their spouses and future retirees.

FOR THE BROTHERHOOD:

(SGD.) T. N. STOL
NATIONAL VICE-PRESIDENT

There appeared on behalf of the Corporation:

C. Rouleau	- Senior Officer, Labour Relations, Montreal
D. Fisher	- Senior Negotiator & Advisor, Labour Relations, Montreal
J. Kish	- Senior Advisor, Customer Services, Montreal
M. Watson	- Assistant-Manager, Customer Services, Montreal

There appeared on behalf of the Brotherhood:

T. N. Stol	- National Vice-President, Ottawa

AWARD OF THE ARBITRATOR

The material before the Arbitrator establishes, beyond controversy, that for many years the Corporation has given retiring employees the option of participating in an extended health care plan. The plan, which is separate and apart from the employees' pension plan, provides for supplementary medical benefits such as the cost of prescriptions and the like. The premium for the plan was paid in part by the retired employees and in part by the Corporation. The decision of the Corporation to withdraw its subsidy of the premium is the cause of the grievance.

It is common ground that the general pension plan covering retired employees, which is separate from the extended health plan, is the subject of periodic negotiations between the parties. For example, the memorandum of settlement made between the parties on April 19, 1989, with respect to the renewal of their collective agreement for a period of three years, contained provisions for the amendment of the Corporation's pension plan for retired employees, as well as negotiated wage increases for active employees. However, the pension provisions are contained within clause 3 of the memorandum of settlement which concludes with the following statement:

> This Clause 3 shall not form part of any Collective Agreement.

A similar memorandum of settlement, with an identical proviso, was negotiated in 1992. It is not disputed that it has been the consistent practice of the parties, for reasons which they best appreciate, to keep the terms of their negotiated pension plan separate and apart from their collective agreement. In a prior award involving another railway and union, this Office found that where the provisions of a pension plan are not part of the parties' collective agreement, the Canadian Railway Office of Arbitration is without jurisdiction to entertain a grievance in respect of the application or alteration of the terms of the plan (*see* ***CROA 1545***).

The extended health care plan and its partial subsidy is independent of the pension plan and has never been the subject of negotiation with the Brotherhood. The material before the Arbitrator establishes that the extended health care plan made available by the Corporation to retiring employees falls entirely outside the negotiated pension provisions which are the subject of memoranda of settlement between the parties made from time to time. There is, very simply, no document, nor any record of any verbal discussion or understanding, ever made between the employer and the bargaining agent with respect to any obligation of the Corporation to provide an extended health care plan, subsidized or otherwise, to retired employees. Article 36 of collective agreement no. 1 and article 34 of collective agreement no. 2 do provide for extended health care benefits for active employees. The collective agreement is silent, however, with respect to any such benefits as they might apply to retirees. It is agreed, however, that pursuant to a practice which appears to have predated the establishment of VIA Rail, which originated under the auspices of CN, retiring employees were given the opportunity of electing to participate in an extended health care plan which was partially subsidized by the employer. Under that arrangement, which was continued by the Corporation until its memo of December 4, 1991, the Corporation subsidized a portion of the premium for retired employees who elected to participate in the extended health care plan.

The Brotherhood submits that the Corporation cannot unilaterally discontinue subsidizing the benefit, and submits that arbitration under the terms of the collective agreement must be available to rectify the loss suffered by the retired employees. Its representative argues that the persons affected took their retirement, some opting for early retirement, on the implicit representation of the Corporation that subsidized extended health care benefits would be available to them, in accordance with long-standing practice. It submits that it is inequitable for the employer to now resile from that undertaking or understanding, and that the employees must have a remedy to support the right which has been violated.

The Arbitrator is not without sympathy for the equities of the case pleaded by the Brotherhood. The issue before me, however, is not whether, as a general matter, a remedy is available to the retired employees affected. The issue is whether the complaint brought on their behalf by the Brotherhood is arbitrable under the rules of the Canadian Railway Office of Arbitration. The Arbitrator's jurisdiction in respect of any grievance arises under clause 4 of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration. It provides as follows:

> **4.** The jurisdiction of the Arbitrator shall extend and be limited to the arbitration, at the instance in each case of a railway, being a signatory hereto, or of one or more of its employees represented by a bargaining agent, being a signatory hereto, of;
>
> **(A)** disputes respecting the meaning or alleged violation of any one or more of the provisions of a valid and subsisting collective agreement between such railway and bargaining agent,

> including any claims, related to such provisions, that an employee has been unjustly disciplined or discharged; and ...
>
> **(B)** other disputes that, under a provision of a valid and subsisting collective agreement between such railway and bargaining agent, are required to be referred to the Canadian Railway Office of Arbitration for final and binding settlement by arbitration.

Care must be utilized in the interpretation and application of the foregoing provision. The parties to the instant collective agreement, like all of the participants in the CROA, are knowledgeable and experienced in the ways of collective bargaining. The Arbitrator does not disagree with the general principles of law argued by the Brotherhood, including the principles reflected in the recent decision of the Supreme Court of Canada in **Re Allan Industries Canada Ltd., a division of Dayco (Canada) Ltd. and United Automobile Workers** (May 6, 1993) to the effect that a trade union may be entitled to invoke rights vested in retired employees under the terms of an expired collective agreement, and vindicate those rights through the grievance and arbitration process. The threshold question, however, is whether the rights asserted in the case at hand are indeed rights arising under the terms of a collective agreement. Clearly they must be, in order to fall within the purview of clause 4 of the Memorandum of Agreement establishing the CROA.

The parties have expressly agreed that the pension rights of retired employees, negotiated from time to time between the Corporation and the Brotherhood, are not to form part of any collective agreement. If they have so provided in respect of negotiated rights and obligations which they have reduced to writing, how can the Arbitrator conclude that subsidized extended health care benefits, which the Brotherhood concedes are "privileges" granted unilaterally by the Corporation, which have never been the subject of discussion or negotiation between the employer and the Union, are an enforceable obligation or term of a collective agreement? In my view it is significant that there is no record of any discussion between the employer and the Union with respect to the terms of the extended health care benefits. The Brotherhood cannot assert that it ever surrendered anything in exchange for the privilege accorded to retirees. Nor can it claim that it relied on an express or implicit undertaking of the Corporation so as to give rise to detrimental reliance which would ground an estoppel.

In the Arbitrator's view the case at hand is to be distinguished from the case of a pension plan which originated in a prior collective agreement and was maintained even though it was omitted from subsequent agreements, or where a workers' compensation benefit top up was not included in a collective agreement, but was undertaken verbally as an inducement at the bargaining table. (*See, e.g.,* ***B.C. Timber Ltd.*** *(1983) 12 L.A.C. (3d) 46 (Fulton);* ***City of Kitchener*** *(1983) 11 L.A.C. (3d) 47 (Saltman).*) In the instant case, if there was any understanding between the parties, it was twofold: firstly, that extended health care subsidies were not a benefit negotiated or obtained by the Brotherhood and, secondly, that as a general rule by extension of the express agreement with respect to the pension plan, the benefits of retired employees have never come under the terms of the collective agreement, unless they are expressly provided for within its four corners. For example, and by way of contrast with the extended health care plan for retirees, article 34 of Agreement No. 1 and article 32 of Agreement No. 2 specifically provide for a fully paid up life insurance policy upon retirement. In the case at hand I must find that there is no substantial or compelling connection between the subsidized extended health care plan as it applies to retired employees and the collective agreement, or the Brotherhood.

Reduced to its simplest terms, the evidence discloses that the Corporation continued to extend a privilege to retired employees. It was never negotiated or included within the terms of the collective agreement, and indeed was never discussed with the Brotherhood, until the Corporation decided on or about December 4, 1991 to revoke the privilege on a phased out basis. The Arbitrator makes no comment as to merits of any claim which the retired employees might be entitled to pursue in another forum with respect to the withdrawal of the extended health care subsidy. Suffice it to say, for the purposes of the dispute at hand, that the matter does not involve the meaning or alleged violation of any expressed or implied provision of a collective agreement, past or present, between the parties nor any estoppel in relation to the application of a collective agreement. On that basis the dispute does not fall within the jurisdictional ambit of clause 4 of the Memorandum of Agreement establishing the Canadian Railway Office of Arbitration. It must therefore be found to be inarbitrable.

In light of the conclusions related above, it is unnecessary for the Arbitrator to deal with the alternative basis of inarbitrability argued by the Corporation by reason of the Brotherhood's alleged failure to submit its *ex parte* statement of issue in conformity with the notice requirements in the rules governing this Office.

The grievance is therefore dismissed.

July 16, 1993

(Sgd.) MICHEL G. PICHER
ARBITRATOR